

CLIENT ALERT!



HONDA v. KEAYS

The Supreme Court of Canada has recently released a widely anticipated decision in Canadian Employment Law – *Honda Canada Inc. v. Keays* [2008] SCJ No. 40 (*Keays*).

Living up to expectations, the *Keays* decision is a landmark in Canadian employment law. Notably, the decision is the latest in what may turn out to be a string of employer-friendly decisions of the Supreme Court (see also *Evans v. Teamsters Local Union No. 31*; *Hydro-Québec v. Syndicat des employés de techniques professionnelles et de bureau d'Hydro-Québec, section locale 200*). Perhaps signaling a trend, a pendulum shift in the employer's favour, in employment related litigation?

FACTS

Mr. Keays had been a 14-year employee with Honda when he was terminated for cause (insubordination). The employee suffered chronic health problems and when instructed by Honda to attend at a medical examination refused to cooperate. In the face of the allegation of cause Mr. Keays was given no notice of termination nor was he paid severance in lieu of notice.

Mr. Keays alleged that he was wrongfully dismissed as no cause for his termination existed, and that, in the circumstances, he was entitled to severance. He went on to allege that Honda demonstrated bad faith in the course and manner of his dismissal, which would entitle him to increased severance, or *Wallace*, damages.

LOWER COURTS

The trial decision caused shock waves with its record-breaking award of damages. The Trial Judge, in what can only be seen as an extremely employee-friendly decision awarded Mr. Keays severance equivalent to a 15-month notice period, a *Wallace* bump equivalent to a further 9 months notice, a \$500,000 punitive damage award and special costs with a 25% premium.

While the Ontario Court of Appeal reduced both the punitive damage award and the cost premium awarded to Mr. Keays at trial, it upheld the lion's share of the trial judge's decision, something the Supreme Court did not see fit to do.

THE SUPREME COURT: THE FATE OF WALLACE DAMAGES AND THE THRESHOLD FOR PUNITIVE DAMAGES

Prior to *Keays*, damages referred to as *Wallace* damages took the form of an arguably arbitrary increase in the notice period. *Wallace* damages sought to compensate employees for damages sustained when an employer engaged in bad faith, dishonest or unfair behaviour in the termination process.

The Court reformulated how such damages are to be calculated, placing the onus of proving actual damages squarely on the employee's shoulders. The court held that instead of an arbitrary award to compensate for the employer's bad behavior, an employee must demonstrate not only that the employer behaved as alleged but also that he or she sustained actual damage as a result, for example: a diagnosis of post traumatic stress disorder or nervous shock.

The Court went on to find that, in the circumstances, there was no behaviour on the part of Honda that was so egregious as to attract an award of punitive damages. The decision serves to explicitly limit the availability of punitive damages to those circumstances where the conduct being penalized is egregious and outrageous. Nothing short of that will do.

IN CONCLUSION

Certain lurking threats that clouded the employer's horizon when dismissing employees have, by virtue of *Keays*, been clarified, or perhaps, in the case of the arbitrary nature of the *Wallace* award, eliminated. An Employer, it would seem, can now act with greater certainty when dismissing an employee; The chance that an employer will face an award of punitive damages as a result of termination has been all but eliminated save in the clearest of cases.

There does, however, remain one outstanding question that should cause employers some concern: is a breach of a *Human Rights* statute an independent actionable wrong that could attract an award of punitive damages, in the right circumstances? This question has been answered once by the Supreme Court, in the 1981 decision of *Seneca College of Applied Arts and Technology v. Bhaduria*, [1981] 2 SCR 181. But, employers beware: the Supreme Court appears to have indicated that, given the right case, it may be prepared to revisit *Bhaduria*. *Keays* simply did not provide the right forum for that discussion.

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